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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1408

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
A BODY POLITIC AND CORPORATE,

*Petitioner,*

*vs.*

VIVIAN B. KING, JOSEPHINE RIZZO, DOROTHY McDONALD AND VERBENA WHITAKER, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES W. COFFEY,
228 North La Salle Street,
Chicago, Illinois 60601
*Attorney for Petitioner.*

JOHN T. MEHIGAN,
JOHN J. DILLON,
MICHAEL J. MURRAY,
*Of Counsel.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To: *The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.*

Petitioner, the Board of Education of the City of Chicago, a body politic and corporate, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered November 12, 1970 reversing and remanding the judgment entered in favor of petitioner on June 3, 1969 by the United States District Court for the Northern District of Illinois, Eastern Division.

## OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is reported at 435 F. 2d 295. It is reproduced in Appendix B to this Petition at pp. A7-A13.

The memorandum opinion of the District Court was not reported. It is reproduced in Appendix B to this Petition at pp. A14-A18.

## JURISDICTION.

The judgment of the Court of Appeals was entered November 12, 1970. A timely petition for rehearing was denied December 2, 1970. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. §1254(1).

## QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals that school board employers could not properly rely upon the interpretative bulletins issued by the Wage and Hour Administrator conflicts with the holding of this Court in *Skidmore* v. *Swift & Co.*, 322 U. S. 134, that such bulletins are entitled to great weight and that employers may properly resort to them for guidance?

2. Whether the decision of the Court of Appeals, that the Administrator's bulletins did not form a proper basis for the Board to invoke the Portal-to-Portal Act bar against actions for overtime and liquidated damages, disregards the intent of Congress expressed in Section 10(a) of that Act affording protection to employers who rely in good faith upon bulletins of the Administrator which are later rescinded or modified?

3. Whether the Court of Appeals erred in substituting its own judgment for that of the District Court when it reversed the trial Court's discretionary finding under Section 11 of the Portal-to-Portal Act that the Board of Education had acted reasonably and in good faith and was not liable to respondents for liquidated damages?

## STATUTES AND INTERPRETATIVE BULLETINS INVOLVED.

This case involves §§ 203, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. §§ 203, 207 and 216(b); §§ 10(a) and 11 of the Portal-to-Portal Act of 1947, 29 U. S. C. §§ 259, 260. The pertinent portions of the statutes involved are set out in Appendix A, pp. A1-A6, *infra*. The Wage and Hour Administrator's Interpretative Bulletins Nos. 656, 678, 708 and 868 are printed in Appendix C, pp. A19-A36, *infra*.

## STATEMENT OF THE CASE.

The respondents are school board central office employees who brought an action against petitioner for overtime compensation under the 1966 amendments to the Fair Labor Standards Act while the case of *Maryland* v. *Wirtz,* 392 U. S. 183 (No. 742, Oct. Term 1967) was being appealed to this Court. In that case, twenty-eight states, including the State of Illinois, were attacking the constitutionality of the new amendments. While *Maryland* was pending on appeal, the Wage and Hour Administrator issued three interpretative bulletins excluding school board central office employees from overtime coverage. Shortly after the last of these bulletins was issued, respondents filed suit claiming overtime compensation and liquidated damages. On October 18, 1968, ten months after respondents filed their action, and four months after this Court held the 1966 amendments constitutional in *Maryland,* the Wage and Hour Administrator rescinded his earlier bulletins and issued a new bulletin stating that central office employees were now covered.

Both parties filed cross-motions for summary judgment. The District Court in an opinion dated May 22, 1969 granted in part the motion of petitioner, and held that since the Board had relied in good faith upon the Administrator's earlier bulletins excluding central office employees from coverage, the Board had a complete defense under Sections 10(a) and 11 of the Portal-to-Portal Act and was not liable to respondents for overtime and liquidated damages for the period prior to October 18, 1968. The District Court found respondents were entitled to overtime from and including October 19, 1968, but awarded no liquidated damages.

Respondents appealed from two portions of the District Court's judgment. First, they appealed from that part of the judgment which held them not entitled to overtime compensation for the period from February 1, 1967 (the effective date of the 1966 amendments) to October 18, 1968. Second, they appealed from that part of the judgment which held them not entitled to liquidated damages after the Administrator had rescinded his earlier bulletins.

On November 12, 1970 the Court of Appeals for the Seventh Circuit in a split decision reversed the judgment of the District Court on the ground that the Wage and Hour Administrator's bulletins were "tentative" and could not be relied upon by school administrators for guidance.

Judge Knoch, dissenting in part, agreed with the District Court that the Administrator was explicit in stating that respondents were not covered by the 1966 amendments, and that the Board could properly rely on the Administrator's bulletins after their existence became known to the Board until they were later rescinded on October 18, 1968. A timely petition for rehearing was denied December 2, 1970. Petitioner applied for a stay of the mandate which was granted and extended until the further order of the Court of Appeals.

## REASONS FOR GRANTING THE WRIT.

1. When the Court of Appeals held that school administrators could not properly rely upon the interpretative bulletins of the Wage and Hour Administrator, it decided a question of signal importance to every employer, public or private, in a manner entirely inconsistent with the public interest, with the prior decisions of this Court, and with the decisions of the Courts of Appeal of the Second, Third, Fourth, Fifth, and Tenth Circuits and the District Court for the Northern District of Illinois, Eastern Division. If allowed to stand, the holding below would place in question all the interpretative opinions of the Administrator and would inhibit employers in the use of these opinions as practical guides in carrying out their statutory responsibilities.

The Court of Appeals decision was based on the ground that the bulletins which excluded central office employees from overtime coverage were "tentative", stating: "They could not have served to aid school administrators during the period of litigation concerning the 1966 amendments." (Appendix A, p. A10, *infra.*) In so stating, the Court overlooked the explicit language employed by the Administrator in advising school boards that they could properly rely upon his opinions while the case of *Maryland* v. *Wirtz* was pending on appeal to this Court. Each of the Administrator's three bulletins provided: "[W]e recognize the need for providing some guidance to the interested parties in the interim." (Appendix C, pp. A19, A21, A23, *infra.*) Clearly, the Board was one of the thousands of school district employers affected "in the interim" for whom the Administrator was "providing some guidance" in issuing his bulletins interpreting the 1966 amendments.

In *Skidmore* v. *Swift & Co.*, 322 U. S. 134, this Court held that employers were properly entitled to rely upon interpretative bulletins of the Wage and Hour Administrator regarding Fair Labor Standards Act coverage of their employees, stating at p. 140:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.* The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (Emphasis added.)

Recently, in *United States* v. *Stapf*, 375 U. S. 118, this Court reiterated the rule in *Skidmore*, and several Courts of Appeal as well as the District Court for the Northern District of Illinois in this and an earlier case, have applied the holding in their decisions: *Tobin* v. *Edward S. Wagner Co.*, 187 F. 2d 977 (Second Cir.); *Goldberg* v. *Sorvas*, 294 F. 2d 84 (Third Cir.); *Libby, McNeil & Libby* v. *Mitchell*, 256 F. 2d 832 (Fourth Cir.) and *Schultz* v. *W. R. Hartin & Son, Inc.*, 428 F. 2d 186 (Fourth Cir.); *Rachal* v. *Allen*, 376 F. 2d 999 (Fifth Cir.); *Mitchell* v. *Greinetz*, 235 F. 2d 621 (Tenth Cir.); and *Wirtz* v. *Healy*, 227 F. Supp. 123 (D. C. N. D. Ill. E. D.), in addition to the trial Court in the instant case.

In the enforcement of the Fair Labor Standards Act, the Administrator must reach informed conclusions as to its meaning. The interpretative bulletins which he issues are intended to indicate that construction of the law which will guide him in the performance of his duties. At the same time, these bulletins serve as a practical guide to employers

in carrying out their statutory responsibilities. *Roland Electric Co.* v. *Walling,* 326 U. S. 657; *Overnight Motor Transp. Co.* v. *Missel,* 316 U. S. 572.

In *United States* v. *American Trucking Associations,* 310 U. S. 534, this Court stated that the Administrator's bulletins were especially persuasive when they were issued to interpret new legislation, saying at p. 549:

> "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

The Administrator was charged by law with the responsibility for interpreting the 1966 amendments. His bulletins excluding school board central office employees from coverage constituted a contemporaneous construction of the amendments by the federal administrator charged with their enforcement. By virtue of the decisions of this Court, the Board had a clear legal right to regard the Administrator's bulletins as a body of informed judgment and a practical guide to which it could properly resort for direction as an employer.

By its decision, the Court of Appeals brings into question the validity of interpretative rulings issued to employers by the Administrator. If the decision below is allowed to stand, employers could very well be subjecting themselves to huge back-pay liabilities and penalties in liquidated damages while at the same time relying in good faith upon an official interpretation of the law. Section 10 of the Portal-to-Portal Act expressly provides that such good faith reliance is a complete defense and bar to the action. Petitioner respectfully urges that certiorari be granted to consider the decision's grave impact on the

credibility of interpretative rulings issued by the Wage and Hour Administrator.

2. In addition to the issue of credibility, this case presents an important federal question concerning the construction and application of Section 10 of the Portal-to-Portal Act, which has not been previously settled by this Court.

The Portal-to-Portal Act was enacted by Congress because it found that the Fair Labor Standards Act had been judicially interpreted to create immense retroactive liabilities upon employers in disregard of long established practice. Section 10 of that Act expressly authorizes employers to rely upon "any written administrative regulation, order, ruling, approval, or interpretation" of the Wage and Hour Division of the Department of Labor or "any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged." The Section further provides that such reliance "shall be a bar to the action or proceeding (for overtime or liquidated damages), notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." In the Congressional debates over this section, Congressman Barden summarized its effect as follows:

> "For instance, if the Wage and Hour Administrator, or one of his deputies, issued a ruling or interpretation under the Act, the employer is allowed to proceed under that without being penalized later when they changed their minds."

Congressman Gwynne, chairman of the House subcommittee agreed with Mr. Barden's interpretation. (Congressional Record, Feb. 27, 1947, p. 1545.) Similarly, Senator Donnell,

chairman of the Senate subcommittee considering H. R. 2157, stated as follows:

> "* * * if, after the employer has relied upon the ruling of the very man who is in charge of the administration of the act, it be discovered years later that the Administrator was wrong, or he himself changes his opinion, and the employer is then subjected to liability, it would appear that it would be unjust to subject him to that liability."

The decision of the Court of Appeals in this case disregarded not only the express provisions of Section 10, but also the clear intent of Congress in enacting it. If allowed to stand, the decision would thwart the legislative intent of Congress that employers, who rely in good faith upon opinions which are later rescinded or modified, should be protected from suits by employees for overtime and liquidated damages.

In *Martinez* v. *Phillips Petroleum Company,* 283 F. Supp. 514, 526 (E. D. Idaho 1968, affd. 9 Cir., 1970, 424 F. 2d 547), plaintiff employees brought an action for overtime and liquidated damages under Section 216(b). Their employer defended under Section 10 of the Portal-to-Portal Act alleging reliance upon a written ruling of the Administrator. As here, the employees contended that the Administrator's ruling was conditional and was not the formal ruling which the Portal-to-Portal Act required for a defense. In dismissing the employees' contention, the Court defined the type of ruling which constitutes a bar, stating at p. 526:

> "The term 'ruling', commonly refers to an interpretation made by an agency 'as a consequence of individual requests for rulings upon particular questions.' Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description." (Gen-

eral Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 29 CFR section 790.17(d).)

"The letter involved here is a *written* ruling or interpretation issued by the *Administrator of the Wage and Hour Division of the Department of Labor.* Said letter was written as a consequence of an individual request for a ruling upon particular questions. Particular facts were presented to the agency. This procedure falls squarely within the requirements of Section 10 of the Portal Act and the above quoted language from the cited regulation."

The interpretative bulletins which excluded school board central office employees from overtime coverage under the 1966 amendments were (1) written rulings, (2) of the Administrator of the Wage and Hour Division of the Department of Labor, (3) written as a consequence of individual requests for rulings upon particular questions, (4) with respect to the class of employers to which the Board of Education belonged. As such, these bulletins complied in every respect with the requirements set forth in Section 10 of the Portal-to-Portal Act and the Board, contrary to the opinion of the Court of Appeals, was legally entitled to regard them as a proper basis for its reliance. Petitioner submits that the decision of the Seventh Circuit reversing the District Court is contrary to the express provisions of the statute and respectfully urges this Court to grant certiorari to review the error.

3. The Court of Appeals erred when it substituted its own judgment for the discretionary finding of the District Court and penalized the Board for liquidated damages after the Administrator had issued his new interpretative bulletin. Section 11 of the Portal-to-Portal Act expressly vests in the trial Court the "sound discretion" to withhold all or part of liquidated damages recoverable under the Fair Labor Standards Act, where the employer shows to

the satisfaction of the Court that his omission was in good faith and that he had reasonable grounds to believe that he was not in violation of the Fair Labor Standards Act. In the exercise of this statutory discretion, the District Court found:

> "Thus, plaintiffs are not entitled to liquidated damages for the period during which defendant relied in good faith on the administrative interpretations of the 1966 amendments. We are also persuaded that defendants do not have to pay liquidated damages for that period after October 18, 1968. Given the fact that defendant was in the midst of protracted litigation aimed at settling the overtime question, it acted reasonably and in good faith. It would be unreasonable to expect defendant to compromise its own case at that time. This is especially true in view of the Board of Education's dire financial condition. Finally, some of the delay in reaching a conclusion to this case cannot be attributed to the defendants and it would be unfair to penalize them with liquidated damages for this time."

In *Reed* v. *Murphy*, 232 F. 2d 668, 678, the Court of Appeals for the Fifth Circuit held that the exercise by the trial Court of its discretion under Section 11 of the Portal-to-Portal Act is a decision entitled to the widest latitude and one which would be altered only on the most compelling circumstances. Similarly, Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact by a District Court in an action tried without a jury should not be set aside unless "clearly erroneous". No such statement is made, nor could one be made by the Court of Appeals with respect to the trial Court's finding under Section 11.

The Court's reasons for reversing the District Court's finding are predicated upon its conjecture that the Board must have believed that it was violating the Fair Labor Standards Act after the Administrator issued his new in-

terpretative bulletin. In making this unwarranted assumption, the Court of Appeals disregards the fact that the Administrator's new bulletin was issued long after the instant litigation had begun and overlooks the fact that as a trustee of public funds the Board sought to have the trial Court enter a final determination of its liabilities so that it would be safe-guarded by payment in full of the judgment order. There is substantial evidence in the record showing that this was the Board's clear intent. In its motion for summary judgment, filed ten days after the close of discovery, the Board specifically asked the trial Court to enter an order fixing any liability it had to respondents, so "that upon payment thereof any liability of defendant hereunder to any plaintiff or person employed in any of the 48 job classifications be completely released, extinguished and discharged." Considering that the Wage and Hour Administrator had reversed his position after his earlier rulings had been in effect for more than a year, the Board was acting prudently in filing its motion to seek a final adjudication by the Court of its liability, since the correctness of any interpretation of the Fair Labor Standards Act can be determined finally and authoritatively only by the Courts. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140.

In determining whether there is evidence to support the findings of the trial Court, the Court of Appeals must review the evidence in the light most favorable to the prevailing party. *Kelly* v. *Layton*, 309 F. 2d 611; *Barryhill* v. *United States*, 300 F. 2d 690. That the Court of Appeals might have given the facts another construction or might have reached a conclusion different from that of the District Judge is insufficient under the Federal Rules of Civil Procedure to warrant disturbing the trial Court's finding. *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F. 2d 788.

There being clear and substantial evidence in the record that the Board believed it had a right to a final adjudica-

tion of its liability and that it was not in violation of the Act by so doing, and the Court of Appeals erred by reversing the finding of the District Court. The Board submits that the decision below constitutes such an unwarranted substitution of the judgment of the Court of Appeals for the discretion of the trial judge as to require review by this Court.

## CONCLUSION.

For the foregoing reasons the Board respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES W. COFFEY,
228 North La Salle Street,
Chicago, Illinois 60601
*Attorney for Petitioner.*

JOHN T. MEHIGAN,
JOHN J. DILLON,
MICHAEL J. MURRAY,
*Of Counsel.*

# APPENDIX A.

## Statutory Provisions Involved.

1. Section 203 of the Fair Labor Standards Act of 1938, as amended. 29 U. S. C. Sec. 203.

**§ 203. Definitions.**

As used in this chapter—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State (except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence), or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall

not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

> (1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit),

* * * * *

shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

* * * * *

> (4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the

aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

* * * * *

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

2. Section 207 of the Fair Labor Standards Act of 1938, as amended. 29 U. S. C. Sec. 207.

**§ 207. Maximum Hours.**

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966.

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

3. Section 216(b) of the Fair Labor Standards Act of 1938, as amended. 29 U. S. C. Sec. 216(b).

§ 216.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall

terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection.

4. Section 259 of the Portal-to-Portal Act of 1947. 29 U. S. C. Sec. 259.

**§ 259. Reliance in Future on Administrative Rulings, Etc.**

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

* * * * *

5. Section 260 of the Portal-to-Portal Act of 1947. 29 U. S. C. Sec. 260.

**§ 260. Liquidated Damages.**

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title.

## APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 17846 SEPTEMBER TERM AND SESSION, 1970.

VIVIAN B. KING, JOSEPHINE RIZZO, DOROTHY McDONALD and VERBENA WHITTAKER, on their own behalf and on behalf of all others similarly situated,
*Plaintiffs-Appellants,*
*vs.*
BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate,
*Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NOVEMBER 12, 1970.

Before SWYGERT, *Chief Judge,* KNOCH, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

KILEY, *Circuit Judge.* Plaintiffs, central office employees of the defendant Board of Education, brought this class action to recover overtime wages and corresponding liquidated damages under Section 216(b)[1] of the Fair

1. Section 216(b) provides in pertinent part:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

Labor Standards Act, 29 U. S. C. § 201, *et seq.* The district court granted overtime wages for only part of the period for which they were sought and denied liquidated damages in toto. We reverse.

Plaintiffs' suit was filed December 18, 1967, seeking recovery of overtime wages since February 1, 1967, the effective date of 1966 amendments to the Act. These amendments brought central office employees of school boards within the overtime provision, and brought school boards within the definition of "employers." The constitutionality of the amendments was challenged by the State of Maryland which was joined by twenty-six other states including Illinois. A three-judge court sustained the amendments on June 13, 1967. *Maryland* v. *Wirtz,* 269 F. Supp. 826 (D. Md. 1967).

While Maryland's appeal from the district court's judgment was pending, the Wage and Hour Administrator on September 22, 1967 issued a bulletin indicating his "tentative opinion" that central office school employees "would not seem to be within the coverage of the [Fair Labor Standards] Act." On October 19, 1967, and December 12, 1967, the Administrator issued further bulletins expressing the same "tentative" opinion.

On June 10, 1968, the Supreme Court affirmed the ruling of the three-judge court upholding the constitutionality of the amendments as applied to school employees. *Maryland* v. *Wirtz,* 392 U. S. 183 (1968). On October 18, 1968 the Administrator rescinded his earlier tentative opinion and stated that central office clerks of school boards were covered by the Act.

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Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

## I.

The district court's judgment before us was entered June 3, 1969. The district court found that defendant had failed to pay overtime from February 1, 1967 to the date of judgment, but that under Section 10(a) of the Portal-to-Portal Act, 29 U. S. C. § 259,[2] the Board was not liable for overtime wages prior to October 18, 1968, the date of the Administrator's final opinion. The district court decided, however, that the Board was clearly liable for overtime after the October 18, 1968 bulletin of the Administrator.

The bar to recovery of overtime under Section 10(a) of the Portal-to-Portal Act is limited by the requirement that an employer plead and prove that his failure to pay "was in good faith conformity with and reliance on . . . any written administrative regulation, order, ruling, approval or interpretation" of the Administrator.

We think the district court clearly erred in denying overtime relief for the period prior to October 18, 1968.

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2. Section 10(a) provides:

> In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

The record discloses that the defendant did not learn of the existence of the administrative bulletins upon which it allegedly relied until January 25, 1968 and that it did not invoke the bar of Section 10(a) based on these bulletins until May 22, 1968 when it filed its third amended answer. But we need not rest our decision upon consideration of these facts. We prefer, instead, to base our conclusion on the grounds that the bulletins of the Administrator allegedly relied upon formed no proper basis for the invocation of the bar of Section 10(a).

The bulletins were vague and ambiguous. They could not have served to aid school administrators during the period of litigation concerning the 1966 amendments. The Administrator hedged his tentative opinion with qualifications: "does not appear appropriate for us to issue interpretations . . . until the court has ruled," "we are not in a position to give anything other than tentative opinions," "would not seem." It is clear from this language that the Administrator did not reach a definitive opinion until October 18, 1968. Although the Board might have acted prudently in delaying payment of the overtime until this date, we hold that such a "tentative opinion" did not provide the Board with the statutory bar to plaintiffs' recovery of the overtime.

Defendant Board also argues that it was relieved, under Section 10(a), from paying the overtime for the period prior to October 18, because it acted in good faith and prudently, given the extensive constitutional attack on the 1966 amendments. Section 10(a), however, requires more than good faith conduct; to be relieved of paying overtime under the Act there must be good faith reliance upon a written administrative order, etc. The Board's reliance on *General Electric* v. *Porter*, 208 F. 2d 805, 817 (9th Cir. 1953), *cert. denied* 347 U. S. 951 (1954); and *Kelly* v. *Ballard*, 298 F. Supp. 1301 (S. D. Cal. 1969), is misplaced.

The claims there were for liquidated damages, which the trial court may, under Section 11[3] of the Portal-to-Portal Act, 29 U. S. C. § 260, refuse to award if the employer acts in good faith and with reasonable grounds for believing that his conduct is not in violation of the Fair Labor Standards Act. Section 11 does not apply to claims for overtime wages.

We conclude that the district court erred in holding the plaintiffs were not entitled to the overtime wages claimed for the period before October 18, 1968.

## II.

The district court also held that plaintiffs were not entitled to liquidated damages under Section 216(b) of the Fair Labor Standards Act. Under that section, liquidated damages in an amount equal to the overtime claimed are automatically awarded as a penalty for wrongful failure to pay overtime. However, Section 11 of the Portal-to-Portal Act, 29 U. S. C. § 260,[4] invests the district courts "with sound discretion" to award no liquidated damages under Section 216(b) "if the employer shows to the satisfaction of the court" that his failure to pay overtime was "in good faith and that he had reasonable grounds" to believe his failure was not a violation of the Act.

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3. Section 11 provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title.

4. See footnote 3, *supra*.

The district court found that the Board was not liable for liquidated damages prior to October 18, since it had found that the Board was not liable for overtime in that period. It also denied liquidated damages claimed for the period after October 18 on the ground that the Board "was in the midst of protracted litigation aimed at settling the overtime question" and since "some of the delay in reaching a conclusion to this case cannot be attributed to defendants." Plaintiffs appeal only from that part of the judgment that denied liquidated damages after October 18, 1968.[5] We hold that plaintiffs were entitled to the liquidated damages sought because defendant had no good reason for believing it was not in violation of the Act by refusing to pay overtime.

It is true, as the district court noted, that the good faith reasonable belief requirement in Section 11 is not limited to good faith reliance on administrative rulings, etc. Section 11 does require, however, that the defendant's failure to pay "was in good faith *and* that he had reasonable grounds for believing" that he was not in violation of the Act. (Emphasis added.) We fail to see how the Board, after the Supreme Court decision in *Maryland* v. *Wirtz, supra*, and after receiving the October 18 bulletin, can be held to have reasonable grounds for believing that it was not in violation of the Act. Its obligation to pay the overtime, at least from October 18, was clearly established by the Administrator's bulletin and must have been clear to the Board, even if it was in the midst of litigation for periods prior to that date. We think also that the question of who delayed the judgment of the district court has no bearing upon whether the Board had reason to believe it was not violating the Act in not paying overtime to plaintiffs.

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5. The plaintiffs do not appeal the denial of liquidated damages for the period prior to October 18, 1968, and we do not decide whether, and to what extent, they would be entitled to liquidated damages for that period.

For the reasons given, the judgment is reversed and the cause is remanded with directions to enter judgment for overtime from February 1, 1967, and for liquidated damages from October 18, 1968, to the date of judgment, June 3, 1969.

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No. 17846

KNOCH, *Senior Circuit Judge.* (Dissenting in part.) Reluctantly I find myself in partial disagreement with my colleagues. I agree with the District Judge that although the Wage and Hour Administrator did say that he was in no position to issue other than tentative interpretations until the Supreme Court had ruled, nevertheless he was explicit in stating his opinion that the plaintiffs were not covered by the new law.

The letters were written rulings sent in response to individual requests on a particular factual situation because, as the Administrator puts it, "we recognize the need for providing some guidance to interested parties in the interim," evidently pending Supreme Court ruling "on the fundamental constitutional issue." The letters seem to me to meet the standards set out in *Martinez* v. *Phillips Petroleum Company,* D. Idaho, E. D., 1968, 283 F. Supp. 514, 526, affd. 9 Cir., 1970, 424 F. 2d 547.

I would hold that the defendant Board could properly rely, in good faith, on these written interpretations of the Administrator, from the time when their existence came to the Board's knowledge until the Administrator's rescission of his earlier opinions on October 18, 1968.

IN THE UNITED STATES DISTRICT COURT,

For the Northern District of Illinois,

Eastern Division.

VIVIAN B. KING, JOSEPHINE RIZZO, DOROTHY McDONALD and VERBENA WITAKER, on their own behalf and on behalf of all others similarly situated,

*Plaintiffs,*

*vs.*

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate,

*Defendant.*

No. 67 C 2161

## MEMORANDUM OPINION.

CROSS MOTIONS FOR SUMMARY JUDGMENT.

This class action is brought pursuant to 29 U. S. C. § 216(b) for overtime compensation allegedly due to plaintiffs under the Fair Labor Standards Act, as amended in 1966, 29 U. S. C. § 207(a)(2). Plaintiffs are officers and members of Council 19, American Federation of State, County and Municipal Employees, AFL-CIO, and are employed by the defendant Board of Education of the City of Chicago. In addition to claiming overtime compensation allegedly due to them from February 1, 1967, plaintiffs seek to impose an additional equal amount as liquidated damages. As a complete defense, the Board of Education has raised the Portal-to-Portal Act, 29 U. S. C. § 259. Both sides are seeking summary judgment.

Under the Fair Labor Standards Act, certain employers are required to pay their employees at an overtime rate for work in excess of the statutory standard workweek. 29 U. S. C. § 207(a)(2). In 1966, the law was amended to include elementary and secondary schools among the covered enterprises. 29 U. S. C. § 203(s)(4). Similarly, the definition of "employer" was modified to eliminate the exemption of States and their political subdivisions with respect to employees of schools. 29 U. S. C. § 203(d). These amendments became effective as of February 1, 1967.

While defendant was subject to the provisions of the law by virtue of the 1966 amendments, it did not pay its employees at overtime rates. About this time, the State of Maryland, with over half of the states, including Illinois, intervening, brought an action for a declaration that the 1966 amendments insofar as they applied to public school employees were unconstitutional and to enjoin enforcement of the act against the states. On June 13, 1967, a three-judge district court, in a split decision, declined to issue either the declaratory judgment or injunctive relief. *Maryland* v. *Wirtz*, 269 F. Supp. 826, 847 (D. Md. 1967).

While an appeal was pending from the district court decision, the Wage and Hour Administrator of the Department of Labor issued relevant opinion letters as to whether clerical personnel in the administrative office of a public school were covered by the new overtime provisions. In Opinion Letter No. 656, September 22, 1967, the Administrator gave his "tentative" opinion that employees "performing general clerical functions for the school system away from the location of any particular school would not seem to be within the coverage of the act." (Defendant's Exhibit 1, at page 2.) On October 19, 1967, and December 12, 1967, the Administrator issued Opinion Letters No. 678 and 708 expressing the same "tentative" viewpoint. (Defendant's Exhibits 2 and 3.)

On June 10, 1968, the Supreme Court held that the 1966 amendments were constitutional. Over four months later, on October 18, 1968, the Wage and Hour Administrator rescinded his earlier opinions and stated that central office employees of school systems were now covered by the amended Fair Labor Standards Act. (Defendant's Exhibit 4.)

Defendant suggests that under the Portal-to-Portal Act, 29 U. S. C. § 259, the Board of Education's good faith reliance upon and conformity with the Wage and Hour Administrator's Letter Opinion Nos. 656, 678, and 708 constitute a complete defense to any liability under the Fair Standards Labor Act before said rulings were rescinded. The Portal-to-Portal Act is designed to protect employers against the retroactive effect of changes in administrative rulings. To come within its protection, a defendant must show that its failure to pay plaintiffs at an overtime wage rate was in good faith conformity with and reliance on a written rulings or interpretations of the Wage and Hour Administrator. *Alicea* v. *Puerto Rico Gas and Coke Co.*, 89 F. Supp. 938, 941 (D. P. R. 1950).

The presence of good faith is determined by evaluating whether the employer acted as a reasonably prudent man would have done in a comparable situation. *Lassiter* v. *Guy F. Atkinson,* 176 F. 2d 984, 993 (9th Cir. 1949). In deciding on his course of action, the reasonably prudent school administrator would undoubtedly take note of the extensive constitutional attack on the 1966 amendment to the Fair Labor Standards Act, the internal disagreement of the three-judge panel in *Maryland* v. *Wirtz,* 269 F. Supp. 826, 847 (D. Md. 1967), and especially the letter opinions of the Wage and Hour Administrator which issued following the split district court decision. We believe defendant's Director of Civil Service Personnel acted as would a reasonably

prudent custodian of public funds in continuing the long standing policy of not paying wages at overtime rates to central office clerical personnel. In view of the dire financial condition in which defendant Board found (and finds) itself, it would have been most imprudent to expend funds in a manner contrary to the tentative opinion of the Wage and Hour Administrator and on the mere expectancy that the Board would be able to recover the funds if the Supreme Court held the 1966 amendments unconstitutional.

It is true, of course, that the Wage and Hour Administrator, in his Opinion Letters Nos. 656, 678, and 708, said it did not appear appropriate to comment on the provisions in question. Nevertheless, he was explicit in his "tentative" opinion that plaintiffs were not covered by the new law. Given the unprecedented scope of the provisions and their ambiguous and challenged legal position, it was not unreasonable for the defendant to conform with the only opinions of the Wage and Hour Administrator, even though those opinions were "tentative."

On June 10, 1968, the Supreme Court finally declared that the 1966 amendments under which the plaintiffs claim in the instant case were constitutional. *Maryland* v. *Wirtz*, 392 U. S. 183 (1968). The Wage and Hour Administrator's definitive ruling that persons in plaintiff's position were covered by these amendments was made on October 18, 1968. From that date, defendant was clearly obliged to pay plaintiffs at an overtime wage rate.

Plaintiffs contend that they are entitled to liquidated damages as well. In addition to being liable for unpaid overtime compensation under the Fair Labor Standards Act, an employer is also liable for an additional equal amount as liquidated damages, 29 U. S. C. § 216(b), unless the court exercises its discretion to relieve the employer of some or all of the extra damages. 29 U. S. C. § 260. Under 29

U. S. C. § 260, the employer must show that his failure to comply with the overtime regulations was in good faith and based on reasonable grounds. *Martinez* v. *Phillips Petroleum Co.*, 283 F. Supp. 514, 529 (E. D. Idaho 1968). Where, as here, a defendant has met the similar, but more stringent, requirements of 29 U. S. C. § 259, he has also satisfied the requirements of the liquidated damages section. *Id.*

Thus, plaintiffs are not entitled to liquidated damages for the period during which defendant relied in good faith on the administrative interpretations of the 1966 amendments. We are also persuaded that defendants do not have to pay liquidated damages for that period after October 18, 1968. Given the fact that defendant was in the midst of protracted litigation aimed at settling the overtime question, it acted reasonably and in good faith. It would be unreasonable to expect defendant to compromise its own case at that time. This is especially true in view of the Board of Education's dire financial condition. Finally, some of the delay in reaching a conclusion to this case cannot be attributed to the defendants and it would be unfair to penalize them with liquidated damages for this time.

In sum, plaintiffs are entitled to be paid at an overtime wage rate from and including October 19, 1968. No liquidated damages will be awarded.

ENTER:

/s/ ABRAHAM L. MAROVITZ,
Abraham L. Marovitz.

Date: May 22, 1969.

## APPENDIX C.

OPINION LETTER OF WAGE-HOUR ADMINISTRATOR, No. 656, SEPTEMBER 22, 1967.

This is in reply to your letters of June 9 and June 27, 1967, concerning the applicability of the Fair Labor Standards Act to a secretary employed by the school district.

We regret the delay in replying to your inquiry, but, as you may know, the constitutionality of the application of the act to certain employees of States and political subdivisions has been challenged in the case of *Maryland et al.* v. *Wirtz*. Though the three-judge District Court has rendered judgment in this suit, the matter has been appealed to the Supreme Court of the United States. We do not know to what extent, if any, the Supreme Court may consider questions of the scope of application of the terms of the statute in relation to the constitutionality of the provisions concerning public schools. Under these circumstances, it does not appear appropriate for us to issue interpretations of these provisions until after the Court has ruled on the fundamental constitutional issue.

There are a number of interrelated provisions in the Fair Labor Standards Act Amendments of 1966 which are relevant to determining the scope of coverage of public school employees, specifically, sections 3(d), 3(r), and 3(s)(4). While, for the reasons stated above, we are not in a position to give anything other than tentative opinions about the scope of these provisions, we recognize the need for providing some guidance to interested parties in the interim. It is clear that coverage of the act extends to public school employees such as custodial and food service employees who work on the premises of the school and we

would also consider that it extends to those employees whose duties take them to the facilities of one or more schools such as school bus drivers or maintenance men who may perform their duties in any of a number of schools within the school system. On the other hand, unless the courts take a different view of the matter, we would not say that under these provisions the act is applicable to employees of the public school system as such merely because of performance of duties that are essentially related to the functioning of the system as a whole. Thus employees who are engaged only in such activities as purchasing materials for a public school system or performing general clerical functions for the system away from the location of any particular school would not seem to be within the coverage of the act.

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OPINION LETTER OF WAGE-HOUR ADMINISTRATOR, NO. 678, OCTOBER 19, 1967.

This is in further reply to your letter concerning the application of the amended Fair Labor Standards Act to employees of your school district.

We regret the delay in replying to your inquiry, but, as you may know, the constitutionality of the application of the act to certain employees of States and political subdivisions has been challenged in the case of *Maryland et al. v. Wirtz*. Though the three-judge District Court has rendered judgment in this suit, the matter has been appealed to the Supreme Court of the United States. We do not know to what extent, if any, the Supreme Court may consider questions of the scope of application of the terms of the statute in relation to the constitutionality of the provisions concerning public schools. Under these circumstances, it does not appear appropriate for us to issue interpretations

of these provisions until after the Court has ruled on the fundamental constitutional issue.

There are a number of interrelated provisions in the Fair Labor Standards Act Amendments of 1966 which are relevant to determining the scope of coverage of public school employees, specifically, sections 3(d), 3(r), and 3(s)(4). While, for the reasons stated above, we are not in a position to give anything other than tentative opinions about the scope of these provisions, we recognize the need for providing some guidance to interested parties in the interim. It is clear that coverage of the act extends to public school employees such as custodial and food service employees who work on the premises of a school and we would also consider that it extends to those employees whose duties take them to the facilities of one or more schools, such as school bus drivers or maintenance men who may perform their duties in any of a number of schools within the school system. On the other hand, unless the courts take a different view of the matter, we would not say that under these provisions the act is applicable to employees of the public school system as such merely because of performance of duties that are essentially related to the functioning of the system as a whole. Thus employees who are engaged only in such activities as purchasing materials for a public school system or performing general clerical functions for the entire system away from the location of any particular school would not seem to be within the coverage of the act.

Whether or not a student who helps in a school cafeteria or office is an employee of the school depends upon the arrangement he has with the school. The sole fact that a student helps in a school lunchroom or cafeteria for periods of thirty minutes to an hour per day in exchange for his lunch is not considered to be sufficient to make him an employee of the school. Also, the fact that students on oc-

casion perform minor clerical work in the school office for periods of an hour per day or less without expectation of pay or for a minimal payment is not considered sufficient in itself to characterize the students as employees of the school. However, in situations where the understanding is that the student will work for wages, there would be an employment relationship, in which event the cash wage together with the reasonable cost of a meal furnished to the student should equal at least the minimum wage under the law for the time worked. The school pamphlet sets forth a complete schedule of the applicable minimum wage and overtime pay requirements.

Section 14 of the act, which provides for the employment of handicapped workers, under special certificates, at wage rates lower than the statutory minimum wage, may apply to the mentally retarded students employed in your work-study program. The terms and conditions of employing such persons are explained in Regulations, Part 524.

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OPINION LETTER OF WAGE-HOUR ADMINISTRATOR, No. 708, DECEMBER 12, 1967.

This is in further reply to your letters concerning the application of the amended Fair Labor Standards Act to employees of public school systems.

We regret the delay in replying to your inquiry, but, as you may know, the constitutionality of the application of the act to certain employees of States and political subdivisions has been challenged in the case of *Maryland et al.* v. *Wirtz*. Though the three-judge District Court has rendered judgment in this suit, the matter has been appealed to the Supreme Court of the United States. We do not know to what extent, if any, the Supreme Court may consider questions of the scope of application of the terms of

the statute in relation to the constitutionality of the provisions concerning public schools. Under these circumstances, it does not appear appropriate for us to issue interpretations of these provisions until after the Court has ruled on the fundamental constitutional issue.

There are a number of interrelated provisions in the Fair Labor Standards Act Amendments of 1966 which are relevant to determining the scope of coverage of public school employees, specifically, sections 3(d), 3(r), and 3(s)(4). While, for the reasons stated above, we are not in a position to give anything other than tentative opinions about the scope of these provisions, we recognize the need for providing some guidance to interested parties in the interim. It is clear that coverage of the act extends to public school employees such as custodial and food service employees who work on the premises of a school and we would also consider that it extends to those employees whose duties take them to the facilities of one or more schools, such as school bus drivers or maintenance men who may perform their duties in any of a number of schools within the school system. On the other hand, unless the courts take a different view of the matter, we would not say that under these provisions the act is applicable to employees of the public school system as such merely because of performance of duties that are essentially related to the functioning of the system as a whole. Thus employees who are engaged only in such activities as purchasing materials for a public school system or performing general clerical functions for the entire system away from the location of any particular school would not seem to be within the coverage of the act.

We would consider your two school districts to constitute a single enterprise within the definition of section 3(r) of the act, since the Board of Trustees of both districts are comprised of the same personnel, and the two districts func-

tion under a single administrative head. Therefore, all hours worked for the enterprise in a single workweek by one employee must be added together when determining his hours worked.

You ask whether you must pay overtime pay to an employee who works 8 hours as a maintenance or custodial employee and who also works 3 hours as a bus driver during the same day. The act generally does not require the payment of daily overtime. Covered public school employees would, however, unless specifically exempt, be subject to premium pay for hours worked in excess of the weekly maximum (currently 44 hours). If such an employee is paid two different rates for the two different types of work, overtime pay may be computed at not less than one and one-half times the employee's average hourly rate. However, if there is an agreement between the employer and the employee prior to the performance of the work, overtime pay may be computed on the rate in effect when the overtime is actually worked. In the latter case, the rate must be the same rate applicable to that job during nonovertime hours. These alternative methods are discussed in sections 778.115 and 778.419 of Interpretative Bulletin, Part 778.

Public school employees engaged in educational programs that are Federally financed are covered under the act, and unless specifically exempt, must receive the applicable minimum wage and overtime pay as provided by the act. The fact that they are paid with monies received from the Federal Government has no significance in determining coverage of such employees under the Fair Labor Standards Act.

The sole fact that a student helps in a school lunchroom or cafeteria for periods of 30 minutes to an hour a day in exchange for his lunch is not considered to be sufficient to

make him an employee of the school, regardless of whether he performs such work regularly or only on occasion. For purposes of the Child Labor Regulations, 14 and 15 year old students working in school cafeterias during the noon hour or during a period when they have no class, will be considered as working "outside of school hours."

The position of student bus "riders" to which you refer is one with which we are not familiar. If you had reference to student bus "drivers", they are considered employees, and must be paid according to the applicable minimum wage and overtime pay provisions. The operation of a motor vehicle is a hazardous occupation and prohibited to anyone under 18 years of age. However, enforcement of this provision with respect to minors between 16 and 18 years of age employed as school bus drivers will be postponed pending an evaluation of all the facts regarding such employment.

Section 13(a)(1) provides an exemption from the act's minimum wage and overtime pay requirements for any employee employed in a *bona fide* executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), as defined in the enclosed Regulations, Part 541.

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OPINION LETTER OF WAGE-HOUR ADMINISTRATOR,
No. 868, OCTOBER 18, 1968.

This is in further reply to your letter in which you present a number of questions concerning the effect of the amended Fair Labor Standards Act on certain operations of the State in view of the recent decision of the U. S. Supreme Court in the case of the *State of Maryland et al.* v. *W. Willard Wirtz* [58 LC ¶ 32,046].

The following answers are keyed to the question numbers in your letter:

(1a) The act, in sections 6, 7, and 3(r) and (s), provides for coverage of all employees employed in an enterprise which "is engaged in the operation of" a school, hospital, or institution described in section 3(s)(4). Where a State or one of its political subdivisions operates such an institution its employees employed in the enterprise are within the act's coverage equally with employees employed in like activities by a privately operated school, hospital, or institution of the kind described in section 3(r) and 3(s)(4). In providing coverage of employees employed in such enterprise, the act makes plain, in these provisions, its intent that activities performed by any person or persons in connection with the operation of the described schools, hospitals, and institutions shall be deemed to be activities performed for a business purpose and within the enterprise coverage of the act "regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit."

The provision in section 3(d) of the act which makes a State or a political subdivision of a State responsible as an employer for compliance with the act with respect to those of its employees employed "in a hospital, institution, or school referred to in the last sentence of subsection (r)

of this section'' covers all of its employees employed in the hospital, institutional, or school enterprise as defined in section 3(r) and 3(s)(4), that is, employees employed in activities in connection with the operation of such a hospital, institution, or school in carrying out its mission of providing personal care or education.

Employees so employed are within the act's coverage of such enterprises in the public as well as in the private sector. Within the meaning of section 3(d) they are employed ''in'' a hospital, institution, or school referred to in section 3(r) because their employment is plainly ''in'' the operating entity envisioned by the legislative draftsmen and described therein, even though they may be part of a central or servicing staff or otherwise employed at a location away from the physical premises where the hospital or institutional services are performed or school classes are conducted, so long as they are employed in the statutory enterprise.

This supersedes the Department's previously announced policy of refraining, tentatively and in the absence of judicial guidelines, from the assertion of enterprise coverage in the case of those employees of State and local public bodies who perform no duties on the hospital, institutional, or school premises. In *Maryland* v. *Wirtz,* [58 LC ¶ 32,046] 392 U. S. 183, the Supreme Court gave consideration to the application of the act to medical and educational functions performed by schools and hospitals operated by the States and their subdivisions. The Court expressly recognized in its opinion that, under the act, ''when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.'' Accordingly, no distinction in the application of enterprise coverage to employment

in hospitals, institutions, and schools described in section 3(s)(4) between employees privately employed in connection with the operation of such institutions and employees of States and their subdivisions so employed appears appropriate.

Some illustrations of the application of the foregoing principles may be helpful. In the case of an independent school district, generally all employees of the district would be employed in activities in connection with the operation of public schools and subject to the monetary standards of section 6(b) and 7(a)(2) unless exempt as teachers, academic administrative personnel, or other executive, administrative, or professional employees defined in 29 CFR Part 541. Some school districts, however, are not engaged in the operation of schools, but only send pupils to other districts which do operate schools. Since the act's coverage of such enterprises is limited to those "engaged in the operation of" the schools described in section 3(s)(4) and 3(r), generally an employee of a district which operates no schools would not be employed in connection with such operation and would not be covered.

Some public school systems are operated as agencies of county or city governments or of the States, rather than by independent school districts. Where a separate agency or unit of such government is charged with the mission of school operation, generally its employees would similarly be subject to the act's provisions regardless of where they work, so long as their work is in furtherance of such mission, unless specifically exempt. Similarly, where a State agency, such as a board of regents or an agency concerned with public hospitals, is charged with functions in connection with the operation of State institutions of higher education or State hospitals, employees of the agency who work in connection with such functions would be subject to the act's provisions unless specifically exempt.

Employees of public bodies employed at central locations where the operations of covered hospitals, institutions, or schools are administered or serviced and whose work involves duties in connection with the operation of such institutions, as in the case of clerical workers performing duties in connection with the purchasing or distribution of operating supplies or equipment for the institutions, or mechanics servicing vehicles or other equipment used in the school or hospital operations, are within the coverage of the act. On the other hand, there may be employees who are engaged in activities too remote from the *operation* of any schools or hospitals to justify a conclusion that they are employed in the covered enterprise, as in the case of employees of State agencies whose work is concerned only with such matters as accreditation or classification of schools or hospitals within the State, or determining qualifications of teachers or hospital personnel generally as distinguished from those required for service in particular schools or hospitals, etc. For example, State boards or commissions of health or education, not responsible for the operation of hospitals or schools would not normally be part of the covered enterprise.

There will be situations where it will be necessary to consider all the facts carefully in order to determine whether the activities of an employee are actually in connection with the operation of any of the hospitals, schools, or other institutions specified by the statute or whether his activities are too remotely related to the institutional operations to constitute employment in the covered enterprise. As in determining the closeness or remoteness of an employee's activities to commerce or production of goods for commerce under the act it is to be expected that coverage determinations in such situations will be based on practical considerations rather than technical concepts and will give effect to the principle that the coverage

phrases should receive a liberal interpretation, consonant with the definitions, with the purpose of the act, and with its character as remedial and humanitarian legislation.

(1b) There is nothing in the act which would prohibit a State from extending the benefits of the act to other State employees, should it desire to do so.

(2 and 3) In order to achieve current compliance with the monetary requirements of the Fair Labor Standards Act, affected State agencies must pay the employees in the newly covered institutions not less than the minimum wage and overtime pay specified in the act. Any delay in achieving compliance will, of course, increase the back wage liability of the State involved. The minimum wage and overtime compensation provisions of the act require the payment of the prescribed wages, including overtime compensation, in cash or negotiable instrument payable at par—(see also answer to question number 12).

With respect to the payment of back wages, it must be noted that the State intervened as a plaintiff in the *Maryland* case and is bound by the result therein. Throughout the proceedings in that case, the Secretary of Labor was subject to successive restraining orders issued by the District Court prohibiting enforcement action against any of the States who were parties to the action. However, every such order contained a provision requiring the plaintiff States to make and preserve adequate records of wages paid to and hours worked by employees covered by the act. The purpose of this provision as understood by counsel and the Court was to permit an accurate computation of the back wages which would be due if the Government eventually were to prevail. Thus, it is clear that despite the seriousness of the issues, there was never any intention that the rights of either the Government or of the employees would be waived during the pendency of the action.

The Wage and Hour and Public Contracts Divisions would not, however, consider as unreasonable any delay in effecting compliance or payment of back wages which might result from restrictions or limitations imposed by current State fiscal policies. This would be true, for example, where it is necessary to make supplementary appropriation requests to the State legislature.

(4) The special overtime plans described in Fiscal Rule Number 30 are permissible with respect to those State employees covered under the Fair Labor Standards Act only if the plans meet the conditions set forth in the following paragraphs.

Except for the special overtime provision for hospital employees in section 7(j) of the act, hours may not be averaged over two or more weeks (see section 778.104 of our Interpretative Bulletin, Part 778). Thus, an employer may not credit an employee with compensatory time (even at time and one-half) for overtime earned which is to be taken at some mutually agreed upon later date, rather than pay cash as it is earned. As explained in section 778.106, overtime compensation earned in a particular workweek must be paid on the regular pay day in which such workweek ends.

However, the act does not prohibit an employer from maintaining his employees' salaries at a constant level from pay period to pay period by controlling the number of hours they work. Thus, where overtime is worked in one week of a pay period, the employees may be laid off a sufficient number of hours during some other week or weeks of the pay period to offset the amount of overtime worked at one and one-half hours off for each overtime hour worked. It should be noted, however, that this arrangement does not permit the employer to "pay" for overtime as time-off. Rather, the employee received all compensa-

tion, including overtime, computed for each week separately, but his total earnings for the pay period are controlled by limiting the number of hours he is permitted to work. It should be noted that under this arrangement overtime compensation due an employee for a workweek in a particular pay period may not be offset by time off in another pay period. A pay plan which does not operate in accordance with the foregoing principles would not meet the requirements of the law.

An employer is not required by the act to submit his pay plans to this office for approval before they become effective.

(5) For the reasons set forth in the 2nd paragraph of our answer to questions 2 and 3, computation of back wages should be made retroactive to February 1, 1967, the effective date of the 1966 amendments to the Fair Labor Standards Act.

(6) Employees who have already received compensatory time off under one of your special overtime plans will have no further claim provided the compensatory time was taken in accordance with the discussion contained in our answer to question number 4. If, however, your special plans do not meet those criteria, there would continue to be a liability on the part of the State, subject, of course, to the 2 year statute of limitations under the Fair Labor Standards Act.

(7) You will have to determine, based on our answer to your question number 4, whether your present Fiscal Rule Number 30 will require revision. In any event, it would not require revision with respect to those State employees who continue to be excluded from coverage of the Fair Labor Standards Act.

(8) The subject of on-call time as compensable hours of work is discussed in section 785.17 of Interpretative Bul-

letin, Part 785. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he can be reached is not working while on-call. Accordingly, such an employee need not be compensated by his employer under the act for such "on-call" time. Of course, if an "on-call" employee is called out for a job assignment, the time devoted to it is hours worked and must be counted and paid for as such. However, under the principles stated in section 778.223 of Interpretative Bulletin, Part 778, sums received by employees for "on-call" time, while not attributable to any particular hours of work, are paid as compensation for performing a duty involved in their jobs and must, therefore, be included in the employee's regular rate of pay for the purpose of computing overtime compensation under the act. Your attention is also invited to the discussion in section 785.23 which is applicable to employees residing on the employer's premises or working at home.

(9) You will have to make your own determination, based on information in this letter, whether your present State Law 3-3-2 (19), CRS [Colorado Revised Statutes] 1963, must be rewritten. It should be noted, however, that certain provisions in that law, particularly those calling for payment of daily overtime pay, are in excess of the requirements of the Fair Labor Standards Act.

(10) The answer to question number 4 is also applicable to "time off" plans.

You also question whether your State government may institute "guaranteed annual wage plans." Section 7(b)(2) of the act provides that an employee may be compensated on the basis of a guaranteed annual wage. Under this section there is a partial exemption from the overtime pay requirements for an employee employed pursuant to

an agreement made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board.

In order to have such a contract come within the provisions of section 7(b)(2), the substantive provisions prescribed by this section should be included in the collective bargaining agreement. Also, a copy of the agreement should be sent to the office of the Administrator within 30 days after the effective date of the agreement, as noted in section 516.20(b) of Regulations, Part 516.

(11) As noted in section 7(a)(2) of the Fair Labor Standards Act, covered, nonexempt State employees must currently be paid premium overtime compensation after 42 hours per week (after 40 hours per week beginning February 1, 1969).

(12) With respect to housing and meal charges, please note that section 3(m) of the act provides, in part, that the wage paid to an employee includes the reasonable cost to the employer of furnishing board, lodging or other facilities, if customarily furnished by the employer. It also provides that such costs shall not be included as part of the wage to the extent that they are excluded therefrom by the terms of a bona fide collective bargaining agreement. In addition, the section contains provisions under which the fair value of the board, lodging or other facilities, rather than the reasonable cost to the employer may be used. This is discussed further in Regulations, Part 531. To the extent that such facilities are part of wages they must be included in the determination of the overtime rate. Your attention is also invited to section 778.5 of Interpretative Bulletin, Part 778, which discusses the relation of this act to other laws generally.

(13) Provisions contained in Federal grants-in-aid have no significance in determining the application of the Fair

Labor Standards Act. Compliance with Fair Labor Standards Act will not, however, excuse noncompliance with other Federal laws which may call for higher standards.

(14) See the opinion letters which were enclosed with our acknowledgement letter of August 7, 1968.

(15) Lists of State employees neet not be submitted to the Wage and Hour and Public Contracts Divisions. Each employer should attempt to determine and designate which of his employees are subject to the Fair Labor Standards Act. If, however, a definite determination cannot be made with respect to a particular employee or group of employees, guidance may be requested from the WHPC Divisions' Field Office or Regional Office.

(16) Whether certain time at the beginning or end of a work day is "hours worked" under the Fair Labor Standards Act depends upon the application of Section 4 of Part III of the Portal-to-Portal Act of 1947 (see page 23 of the enclosed copy of the Fair Labor Standards Act). This is discussed further in sections 785.24 through 785.26 of Interpretative Bulletin, Part 785, and in Interpretative Bulletin, Part 790. Where such time is determined to be "hours worked," it must be included in determining an employee's total hours for overtime pay purposes.

(17) Whether or not time spent in travel by an employee is working time depends upon the type of travel involved. This is discussed in sections 785.34 through 785.41 of Interpretative Bulletin, Part 785.

(18) Employees of a State Highway Department are among those State employees who continue to be excluded from the act's coverage by section 3(d), as previously indicated in our answer to question number one. They continue to be excluded from coverage even though their work is directly related to interstate commerce.

(19) Other classes of State employees may also engage in interstate commerce or in the production of goods for commerce, but if they are not employed in connection with an institution mentioned in section 3(r) of the act, they continue to be excluded from coverage under the Fair Labor Standards Act (see answer number one).